ASSOCIATION OF
AMERICAN RAILROADS

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229589

May 23, 2011

Honorable Cynthia T. Brown
Chief, Section of Administration
Surface Transportation Board
395 E St., S.W.
Washington, DC 20423

Re: Ex Parte No. 684, Solid Waste Rail Transfer Facilities

Dear Ms. Brown:

Pursuant to the Board's Notice served March 24, 2011, attached please find the comments of the Association of American Railroads (AAR) for filing in the above proceeding.

Respectfully submitted,

Louis P. Warchot
Counsel for the Association of
American Railroads

Attachment

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BEFORE THE
SURFACE TRANSPORTATION BOARD

STB EX Parte No. 684

SOLID WASTE RAIL TRANSFER FACILITIES

COMMENTS OF THE ASSOCIATION OF AMERICAN RAILROADS

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COMMENTS OF THE
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Introduction

In a Notice of Revised Interim Rules with Request for Comments ("Revised NPRM") served March 24, 2011, the Surface Transportation Board ("Board"), based on the comments it received in response to its 2009 NPRM[1] in this proceeding, proposed changes to its interim rules with respect to the "review process for land-use exemption permits" under the Clean Railroads Act of 2008, Pub. L. No. 110-432, 122 Stat. 4848 ("CRA"). Revised NPRM at 2. The Board also "modified other aspects of the 2009 NPRM in the interest of clarity and efficiency." *Id.* The Board's Revised NPRM specifically requested that parties "should limit their comments regarding this NPRM to new issues raised by the revisions." Revised NPRM at 3.

The Board also noted in the Revised NPRM that the agency "believe[d] that all of the revisions should now be implemented as interim rules" replacing the currently effective interim rules proposed in the 2009 NPRM, on the grounds that the revised interim rules were "more

[1] STB Ex Parte No. 684, *Solid Waste Rail Transfer Facilities* (served January 14, 2009) ("Notice of Proposed Rulemaking; Adoption of Interim Rules") ("2009 NPRM").

refined" and that the 2009 NPRM interim rules "were drafted without any input from industry and other interested parties." Revised NPRM at 4.[2]

The Association of American Railroads ("AAR"), on behalf of its member railroads, hereby submits these comments in response to the Revised NPRM. The AAR generally supports the Board's revised interim rules and interpretation of the CRA as set forth in the Revised NPRM ***except in one significant respect of statutory interpretation***: the Board failed to recognize in the Revised NPRM that the provisions of 49 U.S.C § 10910 —which generally preserve the "traditional police powers of [a] State to require a rail carrier to comply with State and local environmental, public health and public safety standards that are not unreasonably burdensome to interstate commerce and do not discriminate against rail carriers"-- *do not modify or limit in any respect the Board's express authority to preempt state laws "affecting the siting" of a solid waste rail transfer facility ("SWRTF") under the specific substantive and procedural requirements and criteria of 49 U.S.C. 10908 and 10909 of the CRA.*[3] State and local environmental, public health and public safety laws "affecting the siting" of a SWRTF—regardless whether they may be characterized as falling within the "traditional police powers of the State" under state law --fall squarely within the Board's express preemption authority to issue land-use exemption permits pursuant to the specific criteria and weighing process set forth in section 49 U.S.C. §10909 of the CRA as the language and legislative intent of the CRA make clear.

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[2] As explained by the Board: "While we seek further comment on aspects of the regulations that were not part of the 2009 NPRM, we believe that all of the revisions should now be implemented as interim rules. The public would be better served by placing these refined regulations in effect on an interim basis, rather than leaving in place the rules issued in the 2009 NPRM, which were drafted without any input from industry and other interested parties." Revised NPRM at 4.

[3] 49 U.S.C. § 10910 *("Effect on other statutes and authorities")* provides as follows: "Nothing in section 10908 or 10909 is intended to affect the traditional police powers of the State to require a rail carrier to comply with State and local environmental, public health and public safety standards that are not unreasonably burdensome to interstate commerce and do not discriminate against rail carriers." (emphasis added)

The Board should accordingly correct its proposed interpretation of 49 U.S.C. § 10910 in the Revised NPRM and remove any proposed requirements that would require an applicant to demonstrate that a state law "affecting the siting" of a SWRTF is "unreasonably burdensome" or "discriminates against rail carriers" if the state law can otherwise be characterized as falling within the "traditional police powers of the State" (i.e., in potentially all land-use-exemption permit cases where a state land-use or environmental statute or regulation is at issue) before it may be issued a land-use exemption permit by the Board. The provisions of 49 U.S.C. § 10909 do not require a showing by an applicant that a state law "affecting the siting" of a SWRTF constitutes an "unreasonable burden on interstate commerce" or "discriminates against rail carriers" as a statutory pre-requisite for issuance a land-use exemption permit except in those limited circumstances where the applicant is filing for a permit after receiving an unsatisfactory result from a state or local authority with respect to a law "affecting the siting." See 49 U.S.C. § 10909 (a) (1) (first section); see also 2009 NPRM at 8; Revised NPRM at 21-22. Although in evaluating an application the Board must "consider and give due weight" to whether there would be "any unreasonable burdens imposed on the interstate transportation of solid waste by railroad, or the *potential* for discrimination against the railroad transportation of solid waste..." (one of six specific *factors* that the Board is required to consider and weigh in land-use exemption permit cases under 49 U.S.C. 10909 (see 49 U.S.C. 10909 (d) (6)), such a showing is *not* a pre-requisite for issuance of a land-use exemption permit by the Board except as specifically provided for under 49 U.S.C 10909 (a) (1) (first section). The Board should accordingly modify the rules proposed in the Revised NPRM to implement the provisions of the CRA as Congress directed.

The Board should also *not* make its new statutory interpretation of 49 U.S.C. 10910 (and new interim rules implementing such statutory interpretation) immediately effective on an interim basis as the Board proposed in the Revised NPRM. The Board's new interpretation of section 10910, and the new rules implementing that interpretation, should be stayed pending the outcome of the Board's rulemaking to allow the Board to correct its clear error in statutory construction.

Indeed, as discussed below, the Board's new statutory interpretation not only fails to implement the CRA in accordance with the statutory language and intent, it also conflicts with the Board's prior interpretation of section 10910 in the 2009 NPRM.

The AAR also offers comments on other specific aspects of the Revised NPRM.

Discussion

Overview

Prior to enactment of the CRA, a solid waste rail transfer facility owned or operated by or on behalf of a rail carrier generally came within the Board's jurisdiction under 49 U.S.C. 10501 (c) as part of transportation by a rail carrier. Accordingly, as noted by the Board (Revised NPRM at 2), "state permitting or preclearance requirements (including environmental, zoning and often-land use requirements) that, by their nature, could be used to deny a railroad the right to conduct its operations or proceed with transportation activities at rail transfer facilities, including solid waste rail transfer facilities, as authorized by the Board, were preempted [citations omitted]."

The CRA, enacted October 16, 2008, revised 49 U.S.C. 10501 (c) to remove from the Board's jurisdiction the regulation of solid waste rail transfer facilities, except as provided for in

the Act.[4] The exception, as codified in new sections 49 U.S.C. §§ 10908-10910, provides the Board with the authority to issue land-use-exemption permits for the siting of such facilities. Upon receiving a land-use-exemption permit issued by the Board, a solid waste rail transfer facility need not comply with state laws and other requirements affecting the siting of the facility, as those state laws and requirements would be preempted.[5] The CRA also required the Board to implement procedures governing the submission and review of applications for land-use-exemption permits which procedures are set forth in the Board's 2009 NPRM and Revised NPRM as interim regulations.

The intent of the CRA is to "regulate solid waste rail transfer facilities at the federal and state levels in the same manner as non-railroad solid waste management facilities." 2009 NPRM at 4. At the same time, however, the CRA also seeks to protect the free and efficient flow of rail interstate commerce from state regulation or interference by providing the Board with authority, if petitioned, "to determine *the placement* of solid waste rail transfer facilities that are part of the national rail system through the issuance of land-use-exemption permits, which preempt state and local laws and regulations 'affecting the siting' of such facilities." 2009 NPRM at 2; Revised NPRM at 3 (emphasis added).

The AAR supports the environmental, public health and public safety goals underlying the CRA as applicable to solid waste rail transfer facilities. The AAR also strongly supports the

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[4] 49 U.S.C. §10501 (c)(2), as amended by the CRA, provides in relevant part as follows: "[T]he Board does not have jurisdiction under this part over...(B) a solid waste rail transfer facility as defined in section 10908 of the title, except as provided under sections 10908 and 10909 of this title."

[5] The Board, however, may require compliance with some or all provisions of state law affecting siting as a condition of approval of a land use exemption permit. 49 U.S.C. § 10909 (f). Section 49 U.S.C. § 10910 ("*Effect on other statutes and authorities*") also clarifies that *other than with respect to state laws and requirements affecting siting,* nothing in 49 U.S.C 10908-09 is intended to affect the state's traditional police powers to require railroads to comply with environmental, public health, and public safety regulations so long as the regulations are not unreasonably burdensome to interstate commerce and do not discriminate against rail carriers. (Emphasis added.) See discussion infra at 7-16.

goals underlying the specific provisions of the Act providing the Board with authority to preempt state zoning, land use or other laws (including environmental laws) "affecting the siting" of these facilities through the land-use-exemption permit process. The AAR and individual rail carriers actively participated in the CRA legislative process with the dual aims of protecting the free and efficient flow of rail interstate commerce while recognizing the state's traditional police powers regarding environmental and public health and safety interests, and the AAR views the CRA, *if properly implemented by the Board in accordance with the statutory scheme and Congressional intent*, as attaining those objectives.

AAR Comments on the Board's Proposed Interpretation of 49 U.S.C. § 10910

I. The Board's Construction of 49 U.S.C. 10910 in the Revised NPRM Raises a New Issue of Statutory Interpretation, Fails to Properly Implement the Provisions of the CRA in Accordance with the Language and Intent of the Statutory Scheme, and Conflicts with the Board's Prior Construction of That Provision in the 2009 NPRM.

A. The Board's Construction of 49 U.S.C. § 10910 in the Revised NPRM Is Newly Proposed and Without Rational Foundation as a Statutory Analysis

In the Revised NPRM, the Board noted that its proposed revised interim rules "implementing" the provisions of 49 U.S.C. 10910 constitute one of the "significant revisions to the process set forth in the 2009 NPRM...." Revised NPRM at 4. The Board explained and justified the proposed revised rule "implementing" section 10910 in a single paragraph as follows:

> We are also adding a new requirement that applicants and interested parties state whether the law affecting siting from which exemption is sought is an environmental, public health, or public safety standard that falls under the traditional police power of the state, and if not, to explain why not. *This is necessary because 49 U.S.C. § 10910 and the Board's standard for review in revised 49 C.F.R. § 1155.26(b)(6) (original 49 C.F.R. § 1155.27(b)(4)) provide that a land-use exemption permit will not exempt a state requirement that a rail carrier comply with an environmental, public health, or public safety standard that falls under the state's police powers, unless the requirement unreasonably burdens interstate commerce or discriminates against rail carriers.*

> *Consequently, if the law affecting siting is a law covered by 49 U.S.C. § 10910, the Board will not issue a land-use exemption permit unless the applicant has shown that compliance with the law meets the unreasonable burden or discrimination test.*[6]

Revised NPRM at 5.

The AAR submits that the "statutory construction" of 49 U.S.C. § 10910 in the Revised NPRM lacks any substantive analysis whatsoever of the *actual language* of the provision, of how that provision fits into the CRA legislative scheme, nor of the legislative intent underlying that provision. In its purported "statutory construction" of section 10910 in the Revised NPRM, the Board merely: (1) *paraphrased* the language of 49 U.S.C. § 10910 and (2) cited to a proposed rule in the 2009 NPRM [original 49 C.F.R. § 1155.27(b)(4)) now recodified at revised 49 C.F.R. § 1155.26(b)(6)] in which the Board similarly *paraphrased, in identical words,* the language of section 10910.[7] Moreover, other than to quote in part or paraphrase section 10910 in the 2009 NPRM, the Board proffered no specific explanation of the meaning and purpose of that provision and what reference was made to the provision in the 2009 NPRM implied a statutory construction that was in fact the direct opposite of that proposed by the Board in the Revised NPRM. See discussion infra, at 16-19.

The Board's construction of the provision is thus newly minted in the Revised NPRM and rests solely on the Board's *ipse dixit* that the provision was intended to override the specific provisions of the CRA (49 U.S.C. § 10909) under which Congress specifically set forth the

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[6] Revised 49 C.F.R. § 1155.21(a)(7) provides as follows: "The applicant shall state whether each law, regulation, order or other requirement from which an exemption is sought is an environmental, public health, or public safety standard that falls under the traditional police powers of the state. If the applicant states that the requirement is not such a standard, it shall explain the reasons for its statement."

[7] Original 49 C.F.R. § 1155.27 (b) (4) provided that (paraphrasing 49 U.S.C. § 10910), "A land-use-exemption permit will not exempt a state requirement that a rail carrier comply with an environmental, public health, or public safety standard that falls under the traditional police powers of the state unless the requirement is unreasonably burdensome to interstate commerce or discriminates against rail carriers."

Board's express authority to preempt "all" state laws "affecting the siting" of a SWRTF (49 U.S.C. 10909(f)) and expressly provided the Board with specific ennumerated statutory criteria that the Board must consider and weigh in exercising its express preemption authority (49 U.S.C. 10909 (c) ("Standard for Review") and (d) ("Considerations").

Indeed, contrary to the Board's unsupported assertion, the actual language of 49 U.S.C. 10910 makes no reference whatsoever to the provision's applicability to a state law "affecting the siting" of a SWRTF that is otherwise subject to the Board's express preemption authority under 49 U.S.C. §10909. Moreover, the language, context of section 10910 in the statutory scheme, and legislative intent make clear that it was not intended by Congress to override the specific provisions of 10909 as they apply to a state law "affecting the siting."

B. As the Express Language and Legislative History of the CRA Clearly Demonstrate, 49 U.S.C. § 10910 Was Not Intended to Modify or Limit in Any Manner the Board's Express Exemption Authority Under 49 U.S.C. § 10909 and the Board's Proposed Statutory Interpretation is Clearly Erroneous

The specific language of 49 U.S.C §10910 provides as follows:

> Nothing in section 10908 or 10909 is intended to affect the traditional police powers of the State to require a rail carrier to comply with State and local environmental, public health and public safety standards that are not unreasonably burdensome to interstate commerce and do not discriminate against rail carriers.

In its express language, the provisions of 49 U.S.C. §10910 make no reference whatsoever to state laws "affecting the siting" of a SWRTF that are specifically governed by the provisions of 49 U.S.C. § 10909. This is not a legislative oversight. The purpose of section 10910, as the language, context and legislative history of that provision make clear, is to vest the Board with express preemption authority to issue land-use exemption permits for the placement of SWRTFs under the specific governing criteria of 49 U.S.C. § 10909, while preserving and not otherwise limiting, the state's traditional police power over environmental, public health and

public safety matters that do not "affect the siting" (i.e., placement) of a SWRTF. As the legislative history notes (colloquy between Senators Boxer and Lautenberg):

> Mrs. BOXER.
> I ... would like to enter into a colloquy one aspect in this legislation, the provisions entitled the "Clean Railroads Act of 2008," with my good friend, Senator LAUTENBERG, the distinguished chairman of the Commerce, Science, and Transportation Committee's Subcommittee on Surface Transportation and Merchant Marine Infrastructure, Safety, and Security, and the lead author of this legislation. Mr. Chairman, this legislation makes clear that any solid waste rail transfer facility must comply with all applicable Federal and State requirements, both substantive and procedural, including judicial and administrative orders and fines, respecting the prevention and abatement of pollution, the protection and restoration of the environment, and the protection of public health and safety, including laws governing solid waste, to the same extent as required for any similar solid waste management facility, as defined under the Solid Waste Disposal Act, or SWDA, that is not owned or operated by or on behalf of a rail carrier. *There is an exception in section 604 of this bill, which creates a new section 10909 of title 49 of the United States Code allowing the Surface Transportation Board to issue a land-use exemption for a solid waste rail transfer facility operated by or on behalf of a rail carrier if the Board finds that a State, local, or municipal requirement affecting the siting of such facility meets certain specific criteria.*
> ***
> Mr. LAUTENBERG.
> Mr. President, the distinguished Chairman of the Committee on Environment and Public Works, and my colleague as a senior member of the Committee on Commerce, Science, and Transportation, is correct.This legislation ensures that solid waste rail transfer facilities must fully comply with the substantive and procedural requirements in State and Federal environmental and public health and safety laws, including all permitting requirements, and *generally allows the Surface Transportation Board to issue land-use exemptions so that the Board may continue to be the single agency to guide our country's policies concerning the placement of railroad facilities, which enables a unified national rail system and promotes energy-efficient interstate rail transportation....* Lastly, this bill ensures that solid waste rail transfer facilities, as defined in this legislation, obtain the State permits that any other similar solid waste management facility is required to obtain and comply in full with State law, as described in Sections 603 [§.10908] and 604 [§ 10909]... of the bill, and this bill affirms the States' traditional police powers to require rail carriers to comply with State and local environmental, public health, and public safety standards as described in Section 605 [§10910].....^

154 Cong. Rec. S10283-01, S10286) (Oct. 1, 2008) (Statements of Sen. Boxer and Sen. Lautenberg) (emphasis added).

This purpose is also made clear by the context of section 10910 in the CRA legislative scheme. Section 10908 (a) of the CRA specifically provides that a SWRTF

> shall be subject to and shall comply with all applicable Federal and State requirements ...respecting the prevention and abatement of pollution, the protection and restoration of the environment, and the protection of public health and safety...to the same extent as required for any similar solid waste management facility...that is not owned or operated by or on behalf of a rail carrier, *except as provided for in section 10909 of this chapter.*

(emphasis added) The substantive provisions governing the Board's authority, and applicable standards and criteria for issuing land-use exemption permits regarding state laws affecting the siting of a SWRTF, are set forth in 49 U.S.C. § 10909. The provisions of Section 10910 thus essentially restate and preserve general preemption principles applicable to a state's traditional police powers to require a rail carrier to comply with environmental, public health and public safety laws under those circumstances where the state law, although relating to interstate rail transportation under the jurisdiction of the Board, is *not* otherwise expressly (or impliedly) preempted by federal law (as under the express preemption provisions of section 10909 of the CRA) (i.e., where the state law as it relates to rail transportation activities is not "unreasonably burdensome to interstate commerce" and "does not discriminate against rail carriers." See, e.g., *N.Y. Susquehanna & W. Ry. v. Jackson*, 500 F.3d 238, 252-55 (3d Cir. 2007); *Green Mountain R.R. v. Vermont*, 404 F.3d 638, 641-43 (2d Cir. 2005) ("*Green Mountain*"); *Cities of Auburn and Kent, WA—Petition for Declaratory Order—Burlington Northern Railroad Company—Stampede Pass Line*, 2 S.T.B. 330, 335 (1997) ("*Auburn*"), *affd. sub nom., City of Auburn v. U.S.*, 154 F.3d 1025, 1029-1032 (9th Cir. 1998).

This straight-forward reading of 49 U.S.C. § 10910 as not modifying or limiting in any manner the express preemption provisions of section 10909 as they apply to state laws "affecting the siting' of a SWRTF is made clear not only in the language, legislative history and context of section 10910 in the CRA statutory scheme, but also in the specific heading appended by Congress to section 10910 itself ("Effect on *other* statutes and authorities") (emphasis added). Although statutory titles and section heads cannot limit the plain meaning of the text, they "are tools available for the resolution of a doubt about the meaning of a statute." *Porter v. Nussle*, 534 U.S. 516, 528 (2002); *Florida Dept. of Revenue v. Piccadilly Cafeterias, Inc.*, 554 U.S. 33, 47 (2008). In its purported "statutory construction" of section 10910 in the Revised NPRM, the Board did not even attempt to use the heading of 49 U.S.C. 10910 as a useful tool of statutory interpretation (nor explain why it was not helpful) even though it made specific reference to the heading of section 10910 in its 2009 NPRM (see discussion infra at 18).

"It is a fundamental canon of statutory interpretation that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *Davis v. Michigan Dept. of Treasury*, 489 U.S. 803, 809 (1989); *Florida Dept. of Revenue v. Piccadilly Cafeterias, Inc.*, 554 U.S. 33, 47(2008). The Board, in its construction of 49 U.S.C § 10910, ignored the actual language of that provision, neither read that provision in the context of the provisions of sections 10908 and 10909 nor "with a view to their place in the overall statutory scheme" and came up with a clearly erroneous interpretation of that provision in the Revised NPRM.

C. The Board's Proposed Interpretation of Section 10910 Also Directly Conflicts with the Requirements of Sections 10908 and 10909 of the CRA and Fails to Implement the Statutory Scheme as Enacted by Congress

Under the Board's proposed interpretation of 49 U.S.C. 10910, where the state law "affecting the siting" at issue can be characterized as falling within the "traditional police power" to regulate "environmental, public health and public safety" matters, section 10910 would purportively require the Board to find that the law is "unreasonably burdensome to interstate commerce" or "discriminate[s] against rail carriers" before it can issue a land-use exemption permit.

The Board's proposed statutory interpretation of 49 U.S.C. §10910 would thus effectively override the provisions of 49 U.S.C. 10909 of the CRA in virtually all cases and negate the specific criteria that Congress specifically established for the Board to follow in exercising its express exemption authority over state laws "affecting the siting" of a SWRTF. [8]

First, virtually *all* state laws "affecting the siting" of a SWRTF would likely fall within the scope of section 10910 because they would presumably be based on "environmental, public health and public safety" concerns that traditionally fall within the state's police power (albeit otherwise preempted by federal law). Indeed, the agency's case law is rife with preemption decisions under which a state or locality sought to impose restrictions on a carrier's transportation activities subject to the Board's regulatory jurisdiction under the justification that it was predicated on environmental, public health, or public safety concerns that fall under the state's traditional police powers. See, e.g., *Auburn*, 2 S.T.B. at 336-339 (and cases cited); *Green Mountain*, 404 F. 3d at 642-644 (and cases cited). (In these cases, the Board exercised its preemption authority without regard to the state's characterization of the law at issue.)

[8] It would also conflict with the provisions of 49 U.S.C. § 10908(a) making state environmental, public health and public safety regulations as they may apply to SWRTF's subject to the provisions of 49 U.S.C § 10909.

Second, the Board's construction of section 10910 would directly conflict with the provisions of 49 U.S.C. § 10909 in several respects. As the Board itself properly found, the CRA provides two separate routes for a rail carrier to petition the Board for a land-use exemption: (1) under the last clause of 49 U.S.C. 10901 (a)(1) a rail carrier may directly apply to the Board for a land-use exemption for an existing or proposed SWRTF without first applying to the State for state permits affecting the siting of a SWRTF facility; and (2) under the first clause of 49 U.S.C. 10901(a)(1) a rail carrier or SWRTF may petition the Board for a land-use exemption after first applying to the State and obtaining an unsatisfactory result affecting the siting of a SWRTF. Under the specific language of the CRA, it is only under the first clause of 49 U.S.C. 10909 (a) (1) (i.e., an appeal from an unsatisfactory state result) that a Board finding that a state law affecting the siting "unreasonably burdens the rail transportation of solid waste" or "discriminates against the rail transportation of solid waste" is statutorily required.

The Board's construction would also conflict with the provisions of 49 U.S.C. § 10909 (c) and (d). Under 49 U.S.C. 10909 (c) (Standard for review"), Congress made clear that, "in deciding whether a [SWRTF]...poses an unreasonable risk to public health, safety or the environment," the Board's function is " to weigh the particular facility's potential benefits to and the adverse impacts on public health, public safety, the environment, interstate commerce, and transportation of solid waste by rail." The provisions of subsection 10909 (c) do not require a finding of "unreasonable burden" or "discrimination" before the Board may issue a land-use exemption permit, but specifically provide for the Board's application of a general balancing test of relevant factors.

The Board's interpretation would also conflict with 49 U.S.C 10909 (d) ("Considerations"). Under 49 U.S.C. 10909 (d), the Board is required to "consider and give due

weight" to various factors enumerated in that provision in its evaluation of an application for a land-use exemption. The factors include the land-use, zoning, and siting regulations or solid waste planning requirements of the state where the SWRTF is or will be located that are applicable to non-railroad solid waste transfer facilities or applicable to the property where the SWRTF is proposed to be located ((d) (1)-(2)); regional transportation planning requirements and solid waste disposal plans developed pursuant to State or Federal law ((d) (3)-(4)); any Federal and State environmental protection laws or regulations applicable to the site ((d)(5)); "*any unreasonable burdens imposed on the interstate transportation of solid waste by railroad, or the potential for discrimination against the railroad transportation of solid waste, a [SWRTF] or a rail carrier that owns or operates such a facility*" ((d)(6)) (emphasis added); and "any other relevant factors, as determined by the Board" ((d)(7)).

As is clear from the express language of 49 U.S.C. 10909(d), the Board is simply charged under the statute "to consider and give due weight" to each of the factors enumerated, not to make a specific determination or finding that any single one of them is controlling or even relevant in a specific case. This is particularly true with respect to the "any unreasonable burdens"/"potential for discrimination" considerations set forth in (d)(6), which simply require a Board evaluation of whether or not any unreasonable burdens would be imposed on the interstate rail transportation of solid waste or whether or not the potential for discrimination exists. Indeed, even the specific language of 49 U.S.C. 10909 (d) (6) does not require a consideration of whether actual discrimination exists, but only whether the *potential* for discrimination exists.

Moreover, unlike the standards for review set forth in 49 U.S.C. 10909(c), which require specific determinations by the Board (including "that the facility at the existing or proposed location does not impose an unreasonable risk to public health, safety, or the environment..."),

the considerations set forth in 49 U.S.C. 10909 (d) are simply factors for the Board to "consider and weigh" in light of all the relevant facts. In short, there is no requirement in 49 U.S.C. 10909(d) that the Board make a determination that a state law affecting the siting of a SWRTF "unreasonably burdens" or "discriminates" against the rail transportation of solid waste as a pre-condition of issuing a land-use exemption. Thus, where the Board finds that "the facility at the existing or proposed location does not impose an unreasonable risk to public health, safety, or the environment...," as required under 49 U.S.C. 10909 (c), the Board's may grant a carrier's permit application simply on the basis that it "promotes energy-efficient interstate rail transportation" --or indeed provides other operational efficiencies relating to the rail transportation of solid waste-- at the SWRTF's existing or proposed site as the CRA legislative history would directly support. See Statement of Sen. Lautenberg, supra at 10.[9]

D. The Board's Construction of 49 U.S.C. § 10910 in the Revised NPRM Also Conflicts with its Prior Construction of That Provision in the 2009 NPRM

The lack of legislative analysis in the Board's "statutory construction" of section 10910 in the Revised NPRM is even more glaring when it is considered in light of the fact that the Board's construction of Section 10910 in the 2009 NPRM in fact strongly suggested the opposite (and correct) conclusion: i.e., that section 10910 does *not* modify or limit in any manner the Board's authority to preempt state laws "affecting the siting" of a SWRTF under the standards and criteria of 49 U.S.C. 10909.

[9] Indeed, by imposing as a general pre-requisite for issuance of a land-use exemption permit that the Board must first find that a state law "affecting the siting" would "unreasonably burden the interstate rail transportation of solid waste" or "discriminate against the rail transportation of solid waste," the Board would be improperly favoring state and local interests instead of the federal interest in the placement of SWRTFs for the CRA's purpose of promoting "*a unified national rail system and ... energy-efficient interstate rail transportation.*" as the CRA specifically intended.

In its 2009 NPRM, the Board made only passing reference to the provisions of 49 U.S.C. § 10910 in its discussion of the CRA's statutory scheme and provided no indication that the Board viewed section 10910 as a limitation on (or even relevant to) the Board's express authority to issue land-use exemption permits under the provisions of 49 U.S.C. §§ 10908 and 10909. Indeed, the Board's substantive analysis and construction of the provisions of the CRA in the 2009 NPRM related solely and specifically to sections 10908 and 10909, which are indeed the governing provisions with respect to the Board's authority to issue land-use exemption permits regarding state laws "affecting the siting" of SWRTFs as the 2009 NPRM correctly recognized.

In the 2009 NPRM, the Board noted that the "CRA gives the Board the power, if petitioned, to determine the placement of [SWRTFs]...through the issuance of land-use exemption permits, which preempt state and local laws... 'affecting the siting' of such facilities" 2009 NPRM at 2. The Board further explained that its authority to issue land-use exemption permits was specifically set forth in "sections 603-04 of that act, which are codified at 49 U.S.C 10908-09." *Id.* The Board further noted that "New section 10909, 'Solid waste rail transfer facility land-use exemption,' "prescribes the land-use exemption authority of the Board regarding [SWRTFs]" and that under the requirements of 49 U.S.C 10909 (c) and (d) the Board is required to "[weigh], inter alia, the facility's potential benefits to and adverse impacts on public health and safety, the environment, interstate commerce, and the transportation of solid waste by rail [49 U.S.C. 10909 (c)]."[10] Id at 3; see also *Id* at 10. The Board further noted that "Congress also listed a number of factors for the Board to consider in a land-use-exemption proceeding [section 10909(d)]." [11] *Id* at 3; see also *Id.* at 10-11.

[10] 49 U.S.C. 10909 (c) provides as follows:
[11] 49 U.S.C. 10909 (d) provides as follows:

Although the Board devoted a full thirteen pages of the 2009 NPRM to discussion of the specific substantive and procedural requirements of sections 10908 and 10909 (including the six criteria that the Board must consider and weigh before it may issue a land-use exemption permit (2009 NPRM at 10-11), the Board's reference to 49 U.S.C 10910 in the 2009 NPRM was limited to two sentences that essentially quoted in part or paraphrased the provision and clearly implied (correctly) by statutory caption and context that it did not apply to state laws "affecting the siting" of a SWRTF:

> The [CRA] also adds section 10910, '*Effect on other statutes and authorities*,' which preserves the state's traditional police powers to require railroads to comply with environmental, public health, and public safety regulations so long as the regulations are not unreasonably burdensome to interstate commerce and do not discriminate against rail carriers. (emphasis added)

2009 NPRM at 3.

> When the Board grants a land-use exemption permit, a [SWRTF] is expressly preempted from complying with *any and all* State laws, regulations, orders or other requirements *affecting the siting* of a facility except to the extent that the Board imposes as a condition of the exemption that the facility comply with particular state requirements. See 49 U.S.C. 10909 (f)....
>
> We note that a land-use exemption permit would not preempt a state's traditional police powers to require compliance with state and local environmental, public health, and public safety standards that are not unreasonably burdensome to interstate commerce and do not discriminate against rail carriers. See 49 U.S.C. 10910.

2009 NPRM at 12 (emphasis added). There is thus no discussion whatsoever in the Board's 2009 NPRM that would indicate that the Board construed Section 10910 as limiting or modifying in any manner the Board's authority to preempt state laws *"affecting the siting"* of a SWRTF under the specific provisions of 49 U.S.C 10909 (c) or (d).

The Board's discussion of section 10909 in the 2009 NPRM in fact supported the opposite position: i.e., that the provisions of section 10910 did not affect the Board's substantive

authority under section 10909. The Board thus specifically recognized in the 2009 NPRM that the CRA only required a Board finding of "unreasonable burden" or "discrimination" as a statutory pre-requisite for issuance of a land-use exemption permit only in those situations where a SWRTF first applied to the state for a permit "affecting the siting" of the facility and received an unsatisfactory result from the state agency under 49 U.S.C. 10909 (a) (1) (first part). 2009 NPRM at 8. Where a rail carrier applied directly to the Board for a permit (49 U.S.C. 10909 (a) (1) (a) (second part), or where the Board initiated a permit proceeding at the request of a State Governor under 10908 (b) (2) (B), however, the Board specifically noted that its authority to issue a land-use exemption permit was governed by the provisions of 49 U.S.C. 10909 (c) ("Standard for Review") and (d) ("Considerations"). 2009 NPRM at 3, 10-11.

The Board thus raised no issue in the 2009 NPRM with respect to whether it made any difference to the exercise of the Board's specific authority to preempt state laws "affecting the siting" of a SWRTF under 49 U.S.C. 10909 if the state law "affecting the siting" could be construed as a law falling within the "traditional police power of the State" to regulate environmental, public health, and public safety matters or not. Indeed, in its 2009 NPRM discussion construing the scope of the phrase "affecting the siting" as used in the CRA, the Board expressly found that "[it] believe[d] that the term 'affecting the siting' was purposefully chosen to provide facilities an opportunity to invoke the land-use-exemption-permit process *regardless of the traditional characterization of a particular law.*" 2009 NPRM at 7 (emphasis added). The Board thus expressly recognized that a law "affecting the siting" could be an environmental law or other land-use law generally characterized as falling within the "traditional

police powers of the State," and clearly implied that such characterization was irrelevant to the exercise of its preemption authority over the placement of SWRTF's under the CRA. *Id.* at 7. [12]

AAR Comments on Other Issues in the Revised NPRM

The AAR would also request the Board to make the following modifications to the Revised NPRM:

1. 1155.2(a)(10)(ii)(B) should include "to" or "from" rather than just "from" a tank car directly to a rail tank car.
2. The railroad should not have to file a notice of intent if it is required to submit a land use exemption permit due to a governor's petition under 1155.13 because that petition should provide sufficient notice of intent. As such, 1155.20(a), should be modified to say "Except where an application is required by Subpart B, an applicant ..." Similarly, 1155.22(a) should be modified to also contain the same "except" clause.
3. There are several references in 1155.20(c) and 1155.21(c) (relating to Environmental and Historic Reports) to 1155.25(b) or 1155.25(c). Those should be references to 49 C.F.R. 1105. (1155.25(b) relates to termination of the land use exemption and has nothing to do with environmental or historical reports and there is no 1155.25(c).)

[12] The comments of the parties in response to the 2009 NPRM conformed to the Board's implicit (and correct) view that the provisions of section 10910 did not modify the Board's authority to grant land-use exemption permits for state laws "affecting the siting" of SWRTF's under the provisions of 49 U.S.C. 10909. In its comments in response to the 2009 NPRM, the AAR simply noted that "New section 49 U.S.C. § 10910 ("Effect on other statutes and authorities") also clarifies that *other than with respect to state laws and requirements affecting siting*, nothing in 49 U.S.C 10908-09 is intended to affect the state's traditional police powers to require railroads to comply with environmental, public health, and public safety regulations so long as the regulations are not unreasonably burdensome to interstate commerce and do not discriminate against rail carriers." February 23, 2009 AAR Comments at 2, note 1. (Emphasis added.) The Board failed to even reference (much less respond to) the AAR's view of the law as set forth in the 2009 NPRM. Moreover, to the AAR's knowledge no party to the 2009 NPRM proceeding submitted comments proposing that the provisions of 49 U.S.C. § 10910 be construed in the manner proposed by the Board in the Revised NPRM. Several parties did argue, however, that 49 U.S.C 10909 (a) (1) in conjunction with 49 U.S.C § 10909 (c) created a "two-part standard" that required a Board finding of "unreasonable burden" or "discrimination" as threshold criteria in all cases. The Board correctly rejected this argument in the Revised NPRM (at 23).

4. The AAR questions whether the timing proposed by the Board would work regarding the application/comment schedule. Initial comments on the environmental report are due to the Board 15 days before the application is even filed. The EIS is submitted 45 days before filing the application, with initial comments due in 30 days. It would appear to the AAR that it might be easier for commenters to evaluate the environmental impact if they first knew the scope of the project. In addition, having an application on file during or prior to the environmental comment period might obviate the likely necessity for redundancy in the EIS and the application. The AAR would also note that 1155.26 includes a timeline for the various submittals, but omits the due date for the Notice of Intent (NOI) 30 days prior to filing the application. This should be included in the timeline.

Conclusion

The Board should correct its proposed interpretation of 49 U.S.C. § 10910 in the Revised NPRM and remove any proposed requirements that would require an applicant to demonstrate that a state law "affecting the siting" of a SWRTF is "unreasonably burdensome" or "discriminates against rail carriers" if the state law can otherwise be characterized as falling within the "traditional police powers of the State." The Board should also *not* make its new statutory interpretation of 49 U.S.C. § 10910 (and new interim rules implementing such statutory interpretation) immediately effective on an interim basis as the Board proposed in the Revised NPRM. The Board's new interpretation of section 10910, and the new rules implementing that interpretation, should be stayed pending the outcome of the Board's rulemaking to allow the Board to correct its clear error in statutory construction.

The Board should also adopt the other modifications to the Revised NPRM as proposed by the AAR.

Respectfully Submitted,

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